"all to the knowledge of plaintiff." Thereafter the City put the Erieview-I Project into effect, for which purpose the City borrowed Twenty-Two Million Dollars, expended more than Three Million Dollars for real estate and other requirements, took bids for the sale of land in the project, made a contract with the United States Government requiring it to proceed "and irrevocably committed itself to going forward with the same, all to the knowledge of plaintiff."

Defendants aver that if plaintiff had any right to complain of the character and extent of notice given her of the hearing on the Erieview-I Project she slept on her rights, "failed timely to make effective objection," and is estopped now to raise any question relative to notice.

As to plaintiff's second, third, fourth, fifth and sixth causes of action the defendants in each instance plead the same way: as first defense they deny plaintiff's allegations, and as second defense they affirm that plaintiff failed to pursue the remedy given her by the public hearing on the Erieview plans and "if she ever had any right to complain of the appropriation of her property she has lost the same by standing by while defendants irrevocably committed themselves to the Erieview project."

In her reply to defendants' answer plaintiff denies every material allegation except such as admit facts averred by plaintiff.

STATEMENT OF FACTS.

The facts established at the trial or by the admissions made in the pleadings may be summarized as follows:

For some time prior to and during 1960 the City Planning Commission had under consideration a general plan for the development of the downtown area of the City of Cleveland. This came to fruition in November, 1960.

Pursuant to the provisions of Chapter 51 of the Political Code, Part I of the Codified Ordinances of Cleveland, and specifically of Section 1.5104 (Joint Exhibit A), the City Planning Commission on November 11, 1960, gave notice to all owners of property in the Erieview Renewal Project (Defendant's Exhibit D) of a public hearing on November 22, 1960, to consider adoption of an urban renewal plan for Erieview-I Project (Defendants' Exhibit C-2, covering 96 acres embracing land lying in general between the Cleveland Memorial Shoreway and Chester Avenue, from E. 6th Street to E. 14th Street) and a general neighborhood renewal plan (Defendants' Exhibit C-1, embracing 163 acres including Project I in the downtown area).

The plaintiff received such notice and was represented by her son, an attorney, at the public hearing on November 22, 1960, and at an adjourned continuation of the hearing on November 25, 1960. Due to the large number of persons present he could not be heard personally in protest.

The City Planning Commission on November 25, 1960, adopted the plan for Erieview-I Project, made a finding of facts determining the area to be blighted (Defendants' Exhibit B-2), submitted the same to the City Council in keeping with Section 1.5105 (Joint Exhibit A) and recommended adoption of the plan.

The source material for the determination made by the City Planning Commission as to the nature of the area, in its report to Council, is embraced in fourteen binders (Plaintiff's Exhibits 11-25). No tabulation of all of the data in the binders was made available at the trial.

On December 8, 1960, the plaintiff submitted to the Council and City Planning Commission a written protest (Plaintiff's Exhibit 10) to both the procedure followed and the conclusions reached in the findings of facts above men-

tioned. Plaintiff was represented by her son at a Council committee meeting when the proposal came on for hearing.

On December 12, 1960, the City Council duly approved the General Neighborhood Renewal Plan for Erieview, (Defendants' Exhibit C-1) and Erieview-I Project (Defendants' Exhibit C-2). In the ordinance the Council found "the existence of slum and blighted areas and conditions of deterioration menacing the public health and safety of the citizens of Cleveland." (Defendants' Exhibit C.)

On February 20, 1961, the Council adopted Ordinance 449-61 approving and authorizing the execution of a Loan and Capital Grant Contract with the United States Government to aid in financing Erieview-I Project (Defendants' Exhibit B). Therein Council again referred to the "report based upon surveys, site inspection and analyses made by the City Planning Commission" (Defendants' Exhibit B-2) and made a finding that the Erieview-I project area is "a blighted, deteriorated, and deteriorating area detrimental to and a menace to the public safety, health, morals, and general welfare * * *."

Acting upon the authority thus conferred, the Mayor, in the name of the city, on March 3, 1961, entered into a contract with the United States of America whereby the federal government committed itself to lend to the city for Erieview-I Project the sum of $33,875,784, and to make a capital grant of $9,898,784, and relocation payments of $805,000. (Defendants' Exhibit B-1.)

August 3, 1961, the city invited bids on the redevelopment of a number of parcels in Erieview-I Project (Plaintiff's Exhibit 7) and made available to bidders a detailed prospectus of information (Plaintiff's Exhibit 6). Thereafter a bid was received from Erieview Corporation (a private corporation for profit), the bid was accepted,

and a project agreement was entered into November 9, 1961. (Plaintiff's Exhibit 5). The parcel of land thus sold embraced the premises of the plaintiff, with the provision that the city would deliver title "upon the acquisition thereof." Meanwhile, on September 27, 1961, the city had brought an action in this court to appropriate plaintiff's property.

Reference to Plaintiff's Exhibit 3 conveys an accurate understanding of existing uses of land in Erieview, while Plaintiff's Exhibit 4 presents the plan of the uses to which the same land will be put under urban renewal. Plaintiff's Exhibits 8 and 9 indicate that most of the area is presently zoned as "semi-industrial." It is apparent that the new plan for Erieview will relocate some streets and abandon others, but access from Euclid Avenue or streets south thereof is not eliminated, there being adequate means of approach to Erieview provided in the plan.

The evidence establishes that Erieview is broad in scope and will work a complete transformation of a large area in downtown Cleveland. It will permit the private erection of many large new business, commercial and residential structures. It will beautify an area which in general has grown old and neglected. Yet to accomplish these objectives it must take some properties, notably the plaintiff's which are not deteriorating or in bad condition. It is true also that the private property taken will in many instances, as in the plaintiff's case, be sold eventually to private purchasers to be devoted to private, not public, ends. City funds, as well as federal government money, are being used to bring this about. There is no relationship between the price to be paid for the land acquired and the price for which it will sell to new owners, and it may bring less than it cost.

When the City Planning Commission inspected homes in the area in order to prepare its report, and found building code violations, it did not notify the owners and demand correction of substandard conditions. In all some fifty families and 298 out of 429 businesses will be displaced to make way for the Erieview development.

THE ISSUES.

The issues confronting the Court may be summarized as follows:

(1) Is the plaintiff estopped by laches from bringing this action at this time?

(2) In adopting the Erieview Plan and Erieview-I Project was the City bound by the provisions of Ohio Revised Code Chapter 725, or as a home-rule City could it follow a permissive ordinance adopted by City Council?

(3) At any time during the proceeding by which the City adopted the plan for Erieview and created Erieview-I Project (a) was due process violated, or (b) was there an abuse of discretion?

(4) Was the public welfare served by the City in creating the Erieview plan and in setting up the Erieview-I Project? In other words, was the taking for a public use or purpose? Incidental to his issue are these questions: (a) Having determined that an area is blighted and deteriorating, is the City justified in taking property embraced therein which is not of itself sub-standard or deteriorated? (b) Can the City, having duly decided that a public purpose will be served, proceed to condemn and appropriate private property and then sell the same to private enterprise for private development in keeping with a governmental plan?

CONCLUSIONS OF LAW

This is an action by a property owner who feels that her constitutional rights have been infringed by the action of a powerful arm of government, the City of Cleveland, in attempting to take private property not for a public purpose but for the benefit of other private individuals.

The Court is well aware of its duty to protect the rights of the individual against any unlawful encroachment by government if the facts and the law so warrant. The Court must not be carried away by the immensity of the plans envisioned by government, or the ultimate desirability of the objectives sought to be attained, if in fact they do violence to the rights of the small property owner who is in the path of a proposed public improvement.

At the same time the Court has a clear duty to determine what the facts are and then apply the law impartially, no matter what conclusion is reached.

THE QUESTION OF LACHES

At the outset the Court is confronted by the question of laches. City Council adopted the ordinance creating the Erieview-I Project on December 12, 1960. Prior to such action the plaintiff had protested. On February 20, 1961, the Council took steps to obtain and thereafter did get a commitment from the federal government for a loan and grant of large sums of money to make possible the purchase of land and construction of new buildings in Erieview. In due course the City began acquiring properties, and obtaining bids and making contracts for the erection of new structures in keeping with the renewal plan. During all this activity, which was open and notorious, the plaintiff sat back and did nothing from the time

of her protest until the filing of this suit November 8, 1961. Defendants contend that plaintiff's long delay in bringing action, coupled with the fact of the changed position in which the City now finds itself in respect to Erieview, estops the plaintiff by reason of laches from maintaining suit at this time.

"Laches is such neglect or omission to assert a right as, taken in conjunction with lapse of time and other circumstances, causes prejudice to the adverse party, and therefore operates as a bar in a court of equity. * * * The doctrine of laches proceeds upon the question of the iniquity of permitting a claim to be enforced, which iniquity is founded upon some change in the condition or relations of the property or the parties interested." *Kemper v. Apollo B. & L. Co.*, 11 O. C. C. NS 372 at 373 (1908), affirmed 80 O. S. 732 (1909).

The law is stated thus in 20 *O. Jur.* 2nd "Equity," Sec. 86 pg. 181:

> "The delay, knowledge, and acquiescence of the plaintiff, unless under circumstances giving rise to a presumption of abandonment, or the like, are not alone sufficient to constitute laches, without prejudice to another. Such prejudice may consist of the intervention of the rights of innocent third persons; or it may result from a change of position on the part of the defendant himself, such as the expenditure of money in reliance upon his supposed right or the plaintiff's inaction, at least where the defendant, though technically a wrongdoer, is acting in good faith."

See also *Harris v. The Wallace Manufacturing Co.*, 84 O. S. 104 (1911), at pgs. 108-9:

> "Although it has been said that the personal laches of a taxpayer will not defeat a suit brought by him in a representative capacity, since a suit brought to

vindicate the right of all taxpayers of the district should not be dismissed because of an infirmity in the position of the particular taxpayer who assumes to represent the public interest, the courts have repeatedly held or assumed that the right to relief may be lost by laches or estoppel." 39 *O. Jur.* "Taxpayers' Actions," Sec. 13 Pgs. 23-4.

However, the Court has in mind the well established rule in Ohio, set forth in syllabus 3 of *Emery v. City of Toledo*, 121 O. S. 257 (1929), as follows:

"An owner whose property is being appropriated by a municipality may, at any time before the issue of value is determined, invoke the aid of a court of equity to determine whether the use is a public one, or whether the municipality in its legislative proceedings has complied with reasonable strictness with the statutes whereby the power to appropriate is conferred, or whether the municipality is acting in good faith or abusing its power."

Therefore the Court does not feel constrained summarily to dispose of the case on the ground of laches. The parties deserve an answer to the serious constitutional questions here raised. Until the same are dealt with on their merits both the plaintiff's rights and the status of Erieview will remain in doubt.

AS A HOME-RULE MUNICIPALITY THE CITY WAS NOT BOUND BY THE GENERAL LAWS OF OHIO RELATIVE TO URBAN RENEWAL.

The Court is concerned with the question of whether, as plaintiff contends, the City in adopting the Erieview General Neighborhood Renewal Plan and Erieview-I Project was required to proceed under the provisions of Revised Code Chapter 725 (which incidentally was repealed April 24, 1961), or, as defendants contend, under

Chapter 51 of the Political Code, Part I of the Codified Ordinances of the City. Stated otherwise the question is whether a home-rule city may, under its charter, exercise powers relating to urban renewal without reliance on statutory requirements.

The Constitution of Ohio provides in Article XVIII:

> Sec. 3. "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."
>
> Sec. 7. "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

As the Supreme Court said in *Froelich v. City of Cleveland*, 99 O. S. 376 (1919) at p. 380: "by the adoption of charters cities were authorized to secure immunity from general laws." So the home-rule cities are sovereign within their limits and may enact and enforce measures needed to assure their welfare without resort to state legislation. See: *Fitzgerald v. City of Cleveland*, 88 O. S. 338 (1913); *Reutener v. City of Cleveland*, 107 O. S. 117 (1923); *State ex rel. Leach v. Redick*, 168 O. S. 543 (1959).

The courts have made it clear that a multitude of municipal powers may be exercised without statutory authority and even in violation of such authority where the legislature has no power to restrict the home-rule cities. See *State ex rel. Canada v. Phillips*, 168 O. S. 191 (1958).

It is patent that the City of Cleveland, having long since adopted a charter, (Defendants' Exhibit E), is a home-rule City and as such is possessed of "authority to

exercise all powers of local self-government" under Article XVIII. Among these powers is that of eminent domain, which it may use freely, since it is a power derived from the constitutional provision quoted. An interesting case in point is that of *Simmons v. Cleveland Heights*, 81 O. L. A. 129, 160 N. E. 2nd 677 (1959), decided by Judge Danaceau of this court in 1959, wherein it is held that since a municipality gets the power of eminent domain from the first clause of Section 3, Article XVIII of the Constitution of Ohio the legislature cannot place any limitation on the exercise of such power by a home-rule city.

Sustaining this conclusion is the decision of the Supreme Court of Ohio in *State ex rel. Bruestle v. Rich*, 159 O. S. 13 (1953). Syllabus 9 says:

> "No provision of the Constitution of Ohio authorizes the interference by general laws with the exercise of the power of eminent domain, to the extent that such power is granted to municipalities by Sections 3 and 10 of Article XVIII of that Constitution."

The Court is convinced that the City of Cleveland had full authority under the Constitution of Ohio to deal with the subject of urban renewal within its limits without reference to any general legislation in the Revised Code of Ohio. The Court holds therefore that the City was not bound by the provisions of Revised Code Section 725.03 or any part of that Chapter.

The evidence establishes that "the legislative powers of the City, except as reserved to the people by (the) charter, shall be vested in a council * * *" (*Charter, Section* 24) By ordinances duly adopted and known as Chapter 51, Political Code Part I, Sections 1.5102 to 1.5112 of the Codified Ordinances of the City of Cleveland, the City Council has set up the procedures to be followed in

matters concerning urban renewal projects. The City therefore in establishing the Erieview Plan and Project was bound to follow the provisions of said sections.

IN THE ADOPTION OF ERIEVIEW DID THE CITY FOLLOW DUE PROCESS?

In the sections of the Codified Ordinances mentioned are found detailed standards by which the City may determine whether an area is "blighted, deteriorated or deteriorating." Section 1.5103 authorizes preparation of an Urban Renewal Plan, conforming "to the general plan of Cleveland as adopted in 1949," assuring elimination of substandard conditions both in structures and street layout and preventing their recurrence.

Section 1.5104 provides how the City Planning Commission may adopt an Urban Renewal Plan. It calls for a public hearing in advance of adoption, with notice published at least fourteen days, and mailed to all property owners affected not less than ten days, before the hearing. Section 1.5105 then says that after approval the plan shall be submitted to City Council for its consideration and adoption.

The evidence indicates that the City complied with each of these steps. The City Planning Commission held a hearing and plaintiff was represented by her son, an attorney. The latter had the right to protest at that meeting even though there was a large number of persons present. The hearing was continued for three days, and plaintiff had a chance again to protest before the Commission acted.

The Court is of the opinion that the City Planning Commission, when acting under authority of the procedural ordinance for urban redevelopment, is a fact-finding and planning agency of City Council. Its prime

function then is to prepare data and suggest plans for the benefit of council to the end that that body may draft and adopt whatever legislation it deems appropriate under the existing circumstances. Without action by council all of the Commission's plans for urban renewal would be meaningless. The hearing before the City Planning Commission therefore was part of the legislative process.

Going a step further it must be noted that the Commission submitted to City Council not only a detailed plan for Erieview-I Project but also a full report on "the location, physical condition of structures, land uses, environmental influences, and social and economic conditions in the Erieview-I Project area."

With this plan and report before it City Council proceeded to consider an ordinance embodying the plan and project. A committee of council held a hearing on the same and the plaintiff's son attended and filed a written protest. The ordinance was adopted December 12, 1960. The finding in the ordinance was that the area in question "is a blighted, deteriorated and deteriorating area of the City of Cleveland within the purview of Section 1.5102 * * *."

Nine weeks later council in authorizing the acceptance of a loan and grant from the federal government specifically referred to the report mentioned above and made a finding that the "area is not only a blighted, deteriorated and deteriorating area but is also a slum area detrimental to and a menace to the public safety, health, morals, and general welfare * * *."

The plaintiff contends that by the foregoing proceedings of the City she was not afforded adequate prior notice and that she is being deprived of her property without due process. With this conclusion the Court cannot agree.

Due process of law has never been precisely defined.

Bouvier's Law Dictionary perhaps comes as close as possible to the meaning which may have significance in the instant case:

> "Any legal proceeding enforced by public authority, whether sanctioned by age or custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice." 110 U. S., 516.

The Court is convinced that the notice provided in Section 1.5104 was adequate and reasonable. The legislative procedure of council followed the requirements laid down by Section 1.5102 et seq. The Court finds no denial of due process by reason of the action taken by the City Council in adopting Erieview.

DID CITY COUNCIL ABUSE ITS DISCRETION?

The plaintiff contends that in adopting Erieview, Council abused its discretion by acting arbitrarily and in disregard of the facts as to conditions prevailing in the area. She does not claim that there was any fraud or bad faith in the action taken.

The meaning of "abuse of discretion" was defined by Judge Middleton in *State ex rel. Shafer v. Ohio Turnpike Commission*, 159 O. S. 581 (1953) at page 590:

> "Abuse of discretion by the commission is not specifically charged, but the charge of acting 'arbitrarily'; and 'without the exercise of discretion' means 'abuse of discretion' if anything. Reference to a few of the many available decisions will suffice to demonstrate the general understanding of abuse of discretion.
>
> " 'The exercise of an honest judgment, however erroneous it may seem to be, is not an *abuse of discretion*. Abuse of discretion, and especially gross and palpable abuse of discretion, which are the terms or-

> dinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquence.' *People v. N. Y. C. Rd. Co.*, 29 N. Y., 418, 431, quoted from in *Alliance v. Joyce*, 49 Ohio St., 7, 22, 30 N. E. 270 by Dickman, J."

Clearly, if there were evidence of a discretion exercised for ulterior purposes, or by reason of bias or favoritism, or due to bribery or without any basis of fact, then the Court would be justified in interfering with the legislative act and setting it aside. But in the absence of fraud, bad faith or abuse of discretion as defined, the court will not inquire into legislative motives. Where it appears that the legislative body had before it facts on which it based its action, the court will not review those facts to determine their relative weight or merits. A city council is the sole judge of the propriety and the necessity of ordinances adopted by it.

On this subject, the court in the case of *Sparks v. Village*, 10 O. N. P. (N. S.) 138 at 139 (1910), said:

> "If the court should undertake to measure the judgment of the council in respect to the necessity of an improvement by its own judgment, the effect would be to transfer from the council, where the Legislature has reposed it, to the court and jury the whole matter of determining what improvements are necessary."

In the case of *Railroad Company v. City of Defiance*, 52 O. S. 262 (1895), the plaintiff sought to enjoin a municipal improvement on the ground that the ordinance authorizing it was unreasonable, unlawful and not in the public interest, but for the private benefit of adjacent property owners. The Supreme Court sustained the lower court in refusing to enjoin, saying in syllabus 8:

"The comparative dangers in the use of grade and overhead crossings, and the relative public benefits and private disadvantages that may result from a contemplated improvement of the streets are matters for the consideration of the members of the council, who are the sole judges of the propriety, as well as of the necessity of the improvement; and their decision, when not transcending their powers, nor induced by fraud, is not subject to judicial revision."

One of the strongest statements on the question of judicial review of governmental actions by legislative bodies is found in *State ex rel. Kittel v. Bigelow*, 138 O. S. 497 (1941), at page 502:

"It is not within the judicial province to nullify a statute or ordinance merely because of the alleged impropriety or mistaken beliefs underlying the legislators' reasons for enacting it."

In the instant case, it is clear that City Council had before it facts on which to base its judgment in enacting the Erieview legislation. The Court under the law as cited could not permit the plaintiff to offer her judgment of the basic facts surrounding the Erieview area and the merits of the proposal in lieu of that of the members of council. There has been no evidence of abuse of discretion. Therefore, the Court must say that council's action in adopting Erieview was the exercise of an honest judgment in good faith and not totally without reason.

WAS THE PUBLIC WELFARE SUBSERVED BY THE TAKING OF PRIVATE PROPERTY TO CREATE ERIEVIEW?

The able briefs of the plaintiff and the amicus curiae strongly contend that the condemnation of plaintiff's property should be enjoined because the *primary purpose* of Erieview is not to eliminate a blighted area but to enable

the erection of new privately-owned structures for private purposes. This the defendants deny. The court is, therefore, confronted squarely by the judicial question of whether or not the taking of land to create Erieview is subservient to the public welfare; that is, whether it is for a public purpose and use. If it is not, then plaintiff must be granted the relief prayed for.

The Bill of Rights of the Constitution of Ohio says in Article I, Section 19:

> "Private property shall ever be held inviolate but subservient to the public welfare."

As noted before, Article XVIII, Section 3 of the Constitution has long been interpreted as conferring on home-rule cities the right of eminent domain. In providing for an "appropriation in excess of public use," Section 10 of the same Article says in part:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate * * *."

The Courts of Ohio have long equated a taking of property for the "public welfare" with a taking for "public use." See *McQuillen v. Hatton*, 42 O. S. 202 (1884); *State ex rel. Bruestle v. Rich*, 159 O. S. 13 (1953).

As to what constitutes a public use, 19 *O. Jur.* 2d "Eminent Domain," Section 23, page 434 says:

> "The view has been taken by the Supreme Court that private property may be taken whenever such taking is required by the public safety, public health, public interest, or public convenience, and the Supreme Court has also taken the view that, under Section 19 of Article I of the Constitution, property taken for 'the public welfare' is regarded as property 'taken for public use.' Beyond this, however, no exact definition of the term 'public use' has been agreed upon by

the authorities, and of course there is difficulty in formulating an accurate definition that would be comprehensive and satisfactory. The character of the work for which the property is taken, and not the means or agencies employed for its construction, determine the question of power in the exercise of this right. In other words, the inquiry must be, 'What are the objects to be accomplished,' not 'Who are the instruments for attaining them?' "

What does the evidence show are the objects to be accomplished by Erieview? First, the plan contemplates the elimination of a portion of Cleveland's downtown area which City Council has found to contain a preponderance (1) of structures, detrimental to the public health, safety or welfare, and (2) of defective or inadequate street layout, or faulty lot layout, or conditions which endanger life or property by fire or other causes. The council further declared that these "condition cannot be eliminated except by a complete clearance and redevelopment of the area in accordance with the plan * * *." Second, Erieview establishes a plan for the renewal of the area which will not be circumscribed by existing streets and little alleys, but will permit spacious use of the land to bring to downtown Cleveland not only new business structures but also dwelling accommodations for many people.

The Court is convinced that in this age the public welfare demands a safe and healthy city in every area, and that in addition the well-being of all of its citizens is enhanced by having a beautiful city.

In *State ex rel. Bruestle v. Rich, supra,* the Supreme Court says in the first syllabus:

"Where an urban redevelopment project contemplates the acquisition of property located in a slum area, the elimination of slum conditions in the area by clearing therefrom the buildings and making the land available

for redevelopment and the subsequent sale of the land for redevelopment with restrictions as to its use which will insure against recurrence of slum conditions, and where such project apparently has as its primary purpose the elimination of slum conditions and provisions against their recurrence, such project may involve a public use or purpose for which public funds can be expended and the power of eminent domain exercised."

A land mark decision bearing on urban redevelopment is that of the Supreme Court of the United States in the case of *Berman v. Parker*, 348 U. S. 26 (1954). On page 33, the court says:

"We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. See *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

But the plaintiff raises two potent objections which the Court must not overlook. She says, first, that her property is not substandard or deteriorated and that the City has no reason to condemn it. It is true that the City did not specifically declare plaintiff's property to be blighted; it did, however, find her land to be in a blighted area, and that in order to eliminate the prevailing condi-

tions of the area it was necessary to resort not to "spot" condemnation but to a taking of most of the property in the area, regardless of the condition of any specific piece of property. Could the city legally do this?

In *State ex rel. Bruestle v. Rich* the court had to deal with an objection similar to this. On page 33 Judge Taft said:

> "It does not follow that the area is not a slum area or that the acquisition of the buildings and vacant land referred to [which were not substandard] is not necessary to clear a slum area and prevent a recurrence of the slum conditions in that area."

In *Wilson v. City of Long Branch*, 142 At. 2nd, 837, a New Jersey case (1958), the court says on page 856:

> "It is understandable that individual property owners, who believe their homes to be in good condition and fully adapted to purposes of residence, find it difficult to accept a determination of blight * * *. However, the process contemplated by the law cannot be accomplished by means of individual selection of property. It must proceed in terms of redevelopment of areas. Such improvements will inevitably envelop some property or properties, which standing alone, cannot be so described. When this occurs, the individual must bow to the public welfare and accept just compensation for his deprivation."

The best pronouncement on the objection raised by plaintiff herein, and which in the opinion of the Court disposes of it, is found in *Berman v. Parker, Supra*. On pages 34 to 36 the court says in part:

> "In the present case, Congress and its authorized agencies attack the problem of the blighted parts of the community on an area rather than a structure-by-structure basis. That, too, is opposed by appellants. They maintain that since their building does not imperil health or safety nor contribute to the making of

a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners * * * The experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole. It was not enough, they believed, to remove existing buildings that were insanitary or unsightly. It was important to redesign the whole area so as to eliminate the conditions that cause slums * * * It was believed that the piecemeal approach, the removal of individual structures that were offensive, would be only a palliative * * *"

"* * * Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending * * * If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piece-meal basis—lot by lot, building by building."

Finally plaintiff contends that her land is being appropriated under the device of urban renewal to be sold "to a private developer for private gain," and that this is the primary purpose of the City's action.

With this contention the Court cannot agree. As indicated above, the Court is convinced that the first purpose of the City is to eliminate blight conditions and make it impossible for them to recur. Yet it is true that land in Erieview has been and will be sold to private individuals who will hereafter erect private buildings and perhaps

realize a profit therefrom. Is this in accord with the public welfare?

Again *State ex rel. Bruestle v. Rich* provides an answer. Syllabus 4 bears upon the point and says:

> "If the primary purpose for the exercise of the power of eminent domain is to acquire the property for the public welfare within the meaning of Section 19 of Article I of the Ohio Constitution, the power may be exercised even where there may be an incidental non-public use of the property or benefit from its taking."

Berman v. Parker also speaks with authority on this subject saying on pages 33-34:

> "Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See *Luxton v. North River Bridge Co., Supra*; cf. *Highland v. Russell Car Co.*, 279 U. S. 253. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."

The plaintiff in her brief attempts to distinguish the cases of *State ex rel. Bruestle v. Rich* and *Berman v. Parker* on the ground that they were concerned with "actual elimination of slums" and with "providing low cost housing," whereas such is not true in the instant case. The Court cannot reach this conclusion. The principles laid down in those decisions apply here with equal vigor. The

City is under no obligation to put low cost housing in the area, and if the primary purpose of the condemnation is valid (as the Court has found) then council may determine how best to redevelop Erieview.

The Court refers to the case of *Housing, Etc., Authority v. Minneapolis Metropolitan Co.*, 104 N. W. 2nd 864 (1960), wherein the Supreme Court of Minnesota says at page 870:

> "Because of the location and character of the area and its adaptability to commercial and light industrial purposes, it is understandable that the Authority made no provision for renewal housing within the area. We find nothing, either from an examination of the statutes or the authorities which discuss the subject of renewal uses, that a redevelopment plan must necessarily provide for housing."

The Court does not believe it is relevant to the issues here under consideration that the City has contracted to convey plaintiff's premises, along with additional land, to a developer before it has acquired title.

The land lying in the westerly portion of Erieview was embraced in the first plan for the proposed town of Cleveland, drawn by Spafford, the surveyor, in 1796. By the time of Merchant's Map of 1835 the streets and alleys between East 9th and East 17th Streets were essentially the same as they are now. The engineers of the past did a good job of planning for a little city then of small consequence. But is a large part of the downtown area of the great metropolis of Cleveland to lie moribund in the cocoon which was woven for it when a village more than a century ago?

The City Council in the lawful exercise of its legislative function has determined that the area in question is blighted and deteriorating, and that the public welfare demands its renewal. It has taken steps to acquire the

land for a public purpose and has adopted a reasonable and lawful plan for its future use and development. The City's action to appropriate plaintiff's property now pending in this Court, is properly brought. For these reasons the Court denies plaintiff's prayer for injunctive relief and grants judgment for the defendants.

APPENDIX B.

Journal Entry of the Court of Common Pleas of Cuyahoga County, Ohio.

THIS CAUSE came on for hearing on the 27th day of November, 1961 before the Honorable Donald F. Lybarger upon the pleadings, evidence and arguments and briefs of counsel, and upon consideration, the Court finds the issues joined, except as to laches, for the defendants, and,

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's prayer for injunctive relief herein be and it is hereby denied, and that judgment herein is granted for the defendants who shall recover their costs, for which judgment is hereby rendered.

APPENDIX C.

Opinion of the Court of Appeals of Cuyahoga County, Ohio.

HURD, J.

This cause is here appealed on questions of law from a judgment of the Court of Common Pleas wherein the court denied an injunction sought by the plaintiff against the City of Cleveland, the City Council, and the City Planning Commission from expending any public funds for appropriation of property owned by plaintiff or any other property owners in the area known as "Erieview-I Urban Renewal Project No. Ohio R-36" (hereinafter sometimes referred to as Erieview).

The plaintiff is the owner of a commercial and residential structure located at 1205 St. Clair Avenue within the area which comprises Erieview. An appropriation action was commenced in the Court of Common Pleas by the City under its power of eminent domain which is presently a pending action. This action for injunction was brought to enjoin the City from proceeding with the appropriation proceeding, although concurrently therewith, plaintiff seeks as a taxpayer to enjoin the expenditure of any public funds for any of the purposes of the Erieview Project.

The City of Cleveland (hereinafter referred to as the City) is a Charter City and acting under authority of its Home Rule powers and pursuant to its ordinances, through the City Planning Commission, gave notice on November 11, 1960 to all property owners within the Erieview Renewal Project area of a public hearing to be held on November 22, 1960. The record shows that the public hearing was called for the purpose of considering the adoption of an urban renewal plan for Erieview-I Project and a general neighborhood renewal plan. The area hereinafter

referred to as Erieview comprises approximately 96 acres of land, the major portion of which is zoned as semi-industrial, and lies between Cleveland Memorial Shoreway and Chester Avenue from East Sixth Street to East Fourteenth Street.

The plaintiff, as the owner of the property within this Erieview area, was duly notified in writing of the public hearing and was represented at two such hearings by her son who is an attorney.

Subsequently, on November 25, 1960, the City Planning Commission adopted the plan for Erieview and determined that the area in question was blighted and in accordance with the city ordinances, submitted the same to the City Council with its recommendation that Council adopt the plan.

Over the plaintiff's written protest, the City Council, on December 8, 1960, approved the General Neighborhood Renewal Plan for Erieview and Erieview-I Project and also found "the existence of slum and blighted areas and conditions of deterioration menacing the public health and safety of the citizens of Cleveland." Moreover, the City Council adopted an ordinance approving and authorizing the execution of a Loan and Capital Grant Contract with the United States Government to aid in the financing of Erieview, and pursuant thereto, the City of Cleveland entered into a contract with the United States Government for this purpose. The Federal Government agreed to loan to the City the sum of $33,875,784.00 and to make a capital grant of $9,898,784.00 and relocation payments of $805,000.00.

On September 27, 1961, the City commenced the aforesaid action now pending in the Court of Common Pleas to appropriate the property of plaintiff acting pursuant to its power of eminent domain.

The City proceeded to invite bids for the redevelopment of numerous parcels of land within Erieview, including the parcel owned by the plaintiff, and subsequently accepted a bid offered by Erieview Corporation (a corporation for profit) and entered into a project agreement with it on November 9, 1961, in which the City agreed to deliver title to the Corporation "upon the acquisition thereof, and which agreement contained the condition that a forty story building be erected by said Corporation on a parcel of land of which plaintiff's property is a part. Inasmuch as Federal money is to be used, the whole plan is to conform to standards imposed by the United States Government.

This summary of facts is a condensation of the evidence as set forth in the bill of exceptions, the admissions in the pleadings, the numerous exhibits, and the principal documentary evidence, which in capsule form, is as follows:

1) Joint Exhibit A—being the Procedural Ordinance for Urban Redevelopment—passed June 24, 1959.

2) Defendant Exhibit A—"The Urban Renewal Plan" the general Erieview Project No. 1—plan submitted November 22, 1960.

3) Defendant's Exhibit B-1 "Ordinance No. 449-61"—loan and capital grant contract between City of Cleveland and the United States of America—which is an ordinance authorizing the Federal Loan and Grant Contract; accepting factual report of Erieview conditions and determining Erieview to be a slum area. Passed February 20, 1961.

4) Defendant's Exhibit B-2—"Report to Council" by Director of Urban Renewals: Factual report to Council on Erieview conditions. Received February 13, 1961.

5) Defendant's Exhibit C—Ordinance No. 2428-60—Ordinance approving Erieview Project No. I and General Neighborhood Renewal Plan; finding plans properly adopted and in conformity with all requirements and finding entire Erieview area to be blighted, deteriorated and deteriorating. Adopted December 12, 1960.

6) Plaintiff's Exhibit 10—Letter of Protest by the Plaintiff.

The assignments of error are three in number, with certain subheadings, as follows:

"1) The trial court erroneously rejected evidence proffered by the plaintiff in support of her averments that:

(a) The area in question is not an area blighted, deteriorated or deteriorating, nor detrimental to the public health, safety or welfare and any such finding or determination by the defendants was arbitrary, capricious, contrary to law, and constituted an abuse of discretion and of the powers of the defendants.

(b) That the threatened taking of plaintiff's property by the exercise of eminent domain was for a private and not for a public use.

"2) The Court erred in failing to enter judgment in favor of the plaintiff and against the defendants since this action established that:

(a) The attempted appropriation of plaintiff's property is not for a public use.

(b) Plaintiff is being deprived of her property without due process of law. The constitutional requirements of due notice before adoption of the so-called plan and ordinances which constitute the alleged legal foundation for the City of Cleveland's attempted exercise of the right of eminent domain as to plaintiff's property was not given. No notice

whatsoever was given by either the City Planning Commission or the City Council prior to determining that the said area was blighted or deteriorated or deteriorating so that property owners, including the plaintiff, would have an opportunity to be heard in connection therewith.

(c) The legislative authority, that is, the defendant, City Council, did not hold at least two public hearings prior to the adoption and approval of such plan with notice thereof mailed at least twenty-five days before the first hearing to the last known address of the owner of each parcel of land in said area.

(d) That her real property consists of an improved, standard, commercial and residential structure and her ownership, use and maintenance of it is not detrimental to the public health, safety or welfare.

"3) Finding of the trial court is contrary to and against the manifest weight of the evidence."

Considering assignment of error No. 1-a, it is the contention of the plaintiff in support of her averments that the trial court erred in rejecting the testimony proffered by the plaintiff to the effect that the area in question is not an area blighted, deteriorated and deteriorating or detrimental to the public health, safety or welfare and that any such finding or determination by the defendants was arbitrary, contrary to law and constituted an abuse of discretion by the trial court.

Relative to this claim, we think it should be noted that a distinction must be made between the class of cases which involve solely the police power of the municipality and the class of cases involving what is commonly referred to as a governmental purpose in the public interest.

The instant case is one for a public purpose in the

nature of self-improvement under the City's plan of Urban Renewal.

This is well illustrated by a comparison of two cases decided by the Supreme Court. As pointed out by the defendants, paragraph 6 of the syllabus in *Benjamin vs. City of Columbus*, 167 Ohio St., 103, 146 N. E. 2d 854, states the rule for police power cases:

> "Whether an exercise of the police power does bear a real and substantial relation to the public health, safety, morals or general welfare of the public and whether it is unreasonable or arbitrary are questions which are committed in the first instance to the judgment and discretion of the legislative body, and, unless the decisions of such legislative body on those questions appear to be clearly erroneous, the courts will not invalidate them."

Contrasted with this is a limitation on judicial inquiry in public improvement cases as exemplified by paragraph 8 of the syllabus in *Railroad Company v. Defiance*, 52 Ohio St. 262, 40 N. E. 89, which was an action to enjoin a road improvement that would compel the plaintiff to move or remove its bridges:

> "The comparative dangers in the use of grade and overhead crossings, and the relative public benefits and private disadvantages that may result from a contemplated improvement of the streets are matters for the consideration of the members of the council, who are the sole judges of the propriety, as well as of the necessity of the improvement; and their decision, when not transcending their powers, nor induced by fraud, is not subject to judicial revision."

Attention is also called to the case of *State, ex rel. Kittel v. Bigelow*, 138 Ohio St. 497, 37 N. E. 2d 41, which states the limit on judicial review of a city council's determination of the number of signatures on a petition as follows:

"The determination by the legislative authority of a municipality that there are sufficient signatures on a petition to require submission of a proposed charter amendment to the electorate is conclusive in the absence of fraud or a gross abuse of discretion."

Thus it is clear that there is a real difference between a court's examination of a legislative determination to see if it is "clearly erroneous" as in police power cases, and the substitution of its judgment for that of the legislative body on a showing of fraud or gross abuse of discretion when passing upon the validity of legislative action to carry on public improvements in the interest of public welfare.

An important case is *Berman v. Parker*, 348 U. S. 26, decided by the Supreme Court of the United States in 1954, which rejected the request of the owners of a non-blighted department store to review all of the legislative determinations upon which the development plan was based. The Court held:

"Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."

Likewise in *Kaskel v. Impellitteri*, 306 N. Y. 73, 115 N. E. 2d 659, the court ruled that there was no basis for it to reject the legislative determination, holding the fact question not to be justiciable. At page 80, the court said:

"Therefore, the question here is not whether certain public officials have acted arbitrarily or unwisely in coming to a certain conclusion. Here we have a naked question of legality, that is, of power, and the particular power to make a determination on this matter of judgment has been conferred by statute on these defendants. Four different public bodies have,

after adequate investigation and consideration which appears in the record, determined that this area may properly be considered substandard and insanitary. * * *"

"* * *

"The situation here actually displayed is one of those as to which the Legislature has authorized the city officials, including elected officials, to make a determination, and so the making thereof is simply an act of government, that is, an exercise of governmental power, legislative in fundamental character, which, whether wise or unwise, cannot be overhauled by the courts. If there were to be a trial here and the courts below should decide in favor of plaintiff, there would be effected a transfer of power from the appropriate public officials to the courts."

Thus, we conclude that the City, acting through the Planning Commission and the City Council, was acting in its exercise of governmental power for a public purpose by reason of which the court is not permitted to substitute its judgment for the judgment of the legislative body of the City.

In considering this question, it should be observed that the trial court did not exclude evidence relating to the basis upon which the City Council acted or to any evidence, documentary or otherwise, presented to or before City Council, nor was any evidence excluded concerning the Erieview Corporation, the company which has contracted to build the forty story building which is to rest, in part, on plaintiff's land and no evidence was rejected concerning the purposes of Erieview.

The extensive evidence here shows that the legislative body of the City had before it a great mass of factual data upon which to make its legislative judgment that the area in question is, in fact, a blighted area, deteriorated and deteriorating, and, as a consequence, detrimental to the pub-

lic health, safety and welfare. Thus, we conclude from all the documentary evidence above described and all other evidence contained in the record that the findings of the trial court must be sustained.

It is clear, upon an examination of the documentary evidence, that Section 1-5105 of The Cleveland Procedural Ordinance, which is Joint Exhibit A, entitled "Approval of Plan" requires that an ordinance be adopted approving an Urban Renewal Plan which shall include a finding and determination that the area in question is, in fact, blighted, deteriorated and deteriorating. The Cleveland City Council, by Ordinance No. 2428-60, passed December 12, 1960, adopted the Erieview Plan and made the legislative finding that the area included in Erieview "is a blighted, deteriorated and deteriorating area of the City of Cleveland" within the purview of Section 1-5102 of the Codified Ordinances of the City of Cleveland. Furthermore, in accepting "The Loan and Capital Grant Contract" with the Federal Government to carry out the Erieview Project-I, the City Council once again made an express finding to the same effect. Thus it appears from this and other evidence that the City complied with all procedural requirements in accordance with its laws and ordinances in adopting the Urban Renewal Plan for Project-I and the General Neighborhood Renewal Plan. Such was the finding of the trial court which we must sustain on the basis of competent evidence disclosed in the record and the rule of law defining legislative power when used for a public or governmental purpose.

On this basis, it would be clearly incompetent to admit testimony of individuals interested, expert or otherwise, to testify contrary to the findings and judgment of the City Planning and Legislative Bodies which considered and adopted the plan. This is especially true since

the evidence shows that ample opportunity was afforded to all property owners to be heard in opposition to the findings of Council. The notice to property owners in the area, in part, contained the following:

> "The Cleveland City Planning Commission has heretofore determined the above-described areas to be both blighted or deteriorated and deteriorating areas within the definition of Section 1.5102 of the Codified Ordinances of the City of Cleveland.
>
> "The purpose of this hearing is to consider the proposals of the Urban Renewal Plan, and to afford to all persons or organizations present thereat an opportunity to be heard, prior to the adoption of said plan by the City Planning Commission, and its referral to the Council of the City of Cleveland for approval as provided for in Sections 1.5104 and 1.5105 of the Codified Ordinances of the City of Cleveland.
>
> "*Documents comprising the proposed Urban Renewal Plan for Project No. 1 and the General Neighborhood Renewal Plan are available for public inspection at 520 City Hall, Cleveland, Ohio.*" (Emphasis added.)

The trial court found that the notice of which the above quoted section is a part was adequate and reasonable as provided in Section 1.5104 of the Ordinances of the City, a finding of fact which, upon examination of the procedural ordinances of the City, including Section 1.5104, we sustain.

Having determined that the judicial branch of the government may not substitute its judgment for the legislative branch unless it is clearly shown that the legislative branch has exceeded its constitutional powers or has acted fraudulently or in bad faith, or has abused its discretion, we are obliged to sustain the trial court in rejecting the evidence proffered by the plaintiff. There is no claim here of fraud or bad faith. There is, however, the claim of an

abuse of discretion upon the part of the City Planning Commission and the City Council. Upon consideration of the record, the exhibits, and all other evidence, we are of the opinion that the trial judge did not err in finding that there was not an abuse of discretion upon the part of the City Council, acting in its legislative capacity for a public purpose, or upon the part of the Planning Commission, it being understood that the Planning Commission was acting in an official capacity as a fact-finding body for the City Council. For the reason stated, assignment of error 1-a is overruled.

We come now to a consideration of assignments of error 1-b and 2-a, both of which involve substantially the same claim, namely that the attempted appropriation of plaintiff's property is for a private and not for a public use. The contention here made is the same as was made in the case of *State, ex rel. Bruestle v. Rich*, 159 O. S. 13, 110 N. E. 2d 788. Syllabus 1 of that case reads:

> "1. Where an urban redevelopment project contemplates the acquisition of property located in a slum area, the elimination of slum conditions in the area by clearing therefrom the buildings and making the land available for redevelopment and the subsequent sale of the land for redevelopment with restrictions as to its use which will insure against recurrence of slum conditions, and where such project apparently has as its primary purpose the elimination of slum conditions and provisions against their recurrence, such project may involve a public use or purpose for which public funds can be expended and the power of eminent domain exercised."

The evidence here shows that Federal money is to be used and the purpose of the plan is to prevent the recurrence of blighted conditions and the plan conforms to standards imposed by the United States Government.

Referring again to the *Bruestle* case, syllabus 4 reads:

"4. If the primary purpose for the exercise of the power of eminent domain is to acquire the property for the public welfare within the meaning of Section 19 of Article I of the Ohio Constitution, the power may be exercised even where there may be an incidental nonpublic use of the property or benefit from its taking."

Judge Taft, speaking for the court in the *Bruestle* case, made the following significant statement at page 22:

"An examination of those ordinances and of that contract clearly discloses that the redevelopment of this area contemplates the acquisition by the city, either by purchase or through the exercise of the right of eminent domain, of the property located in the area, the elimination of slum conditions in the area by clearing therefrom the buildings and making the land available for redevelopment, and the subsequent sale of the land for redevelopment with restrictions as to its use which will insure against recurrence of any slum or other conditions of blight; and discloses that the primary purpose of the redevelopment of this area is to eliminate the slum conditions and other conditions of blight and provide against their recurrence."

Judge Taft further stated:

"The validity of urban redevelopment projects similar to the project involved in the instant case has been uniformly sustained by the courts of last resort in other states." (Citing authoritative cases from Alabama, Arkansas, Illinois, Michigan, New York, Pennsylvania, Rhode Island and Tennessee.)

In headnote 2 of *Schenck v. Pittsburgh*, 364 Pa. 31, it is stated:

"2. Where the right of eminent domain is vested in a municipality, an administrative body, or even a

private corporation, the question as to whether the circumstances justify the exercise of the power in a given instance is not a judicial one, at least in the absence of fraud or palpable bad faith."

In *Zurn v. City of Chicago*, 389 Ill. 114, headnote 2, is found the following:

"2. Constitutional Law—Neighborhood Redevelopment Corporation Law of 1943 is not invalid as authorizing taking private property for other than public use. As the legislature has determined that the elimination of conditions conducive to ill-health, transmission of disease, infant mortality, juvenile delinquency, crime and poverty as enumerated in section 2 of the Neighborhood Redevelopment Corporation Law of 1943 is in the interest of health, morals, safety and general welfare of the citizens of the State, the Supreme Court cannot say that the legislative finding that the elimination and redevelopment of slum and blight areas is a public purpose is unwarranted, and such use constitutes a public use regardless of the use to be made of the property after the redevelopment has been achieved."

Also, in the *Opinion of the Justices*, No. 119, 254 Ala. 343, headnote 2, there is the following:

"2. The statute authorizing taking of land in slum area by housing authority through exercise of power of eminent domain and disposal of such land at its use value in accordance with plan for redevelopment by private enterprises or by public agencies authorizes a taking for a 'public use' permitted by the constitution, in view of the public benefit resulting from slum clearance and redevelopment."

A pertinent declaration is also made in *Berman v. Parker*, 348 U. S. 26, a case cited by the trial court at pages 33 and 34:

"* * * Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. See *Luxton v. North River Bridge Co., supra*; cf. *Highland v. Russell Car Co.*, 279 U. S. 253. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. * * *"

For the reasons stated, we sustain the conclusions of fact and law found by the trial court and, therefore, overrule assignments of error 1-b and 2-a.

This brings us to a consideration of appellant's assignments of error Nos. 2-b, 2-c and 2-d, which will be considered together. The claims of appellant that she was not accorded due process of law are grounded primarily on her claim that the court did not follow Section 725, et seq., Revised Code, which was repealed April 24, 1961. The contention of the City is that the action here taken was under authority of its home rule powers under Article I8, Section 3 of the Ohio Constitution which provides:

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This grant of power, as contended by the appellee, is self-executing and plenary, except only as limited by

parallel constitutional provisions. We are of the opinion that this grant of power applies to the facts of the instant case, as the City of Cleveland, under its Home Rule Charter, may undertake and carry out all provisions for self-improvement, a proposition which has been upheld by numerous decisions of our Supreme Court.

Referring once again to the *Bruestle* case, *supra*, syllabus 7 reads:

> "'All powers of * * * self government' as set forth in Section 3 of Article XVIII of the Ohio Constitution include the power of eminent domain."

and syllabus 9 reads:

> "No provision of the Constitution of Ohio authorizes the interference by general laws with the exercise of the power of eminent domain, to the extent that such power is granted to municipalities by Sections 3 and 10 of Article XVIII of that Constitution."

See also: *Froelich v. City of Cleveland*, 99 Ohio St. 376, 124 N. E. 212; *State, ex rel. City of Toledo v. Weller*, 101 Ohio St. 123, 128 N. E. 88; *State, ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 100 N. E. 2d 225; *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N. E. 2d 250; *State, ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 98 N. E. 2d 835; *Babin v. City of Ashland*, 160 Ohio St. 328, 116 N. E. 2d 580; *State, ex rel. Leach v. Redick*, 168 Ohio St. 543, 157 N. E. 2d 106; *State, ex rel. Bindas v. Andrish*, 165 Ohio St. 441, 136 N. E. 2d 43.

We, therefore, overrule assignments of error Nos. 2-b, 2-c and 2-d.

Proceeding to consider assignment of error No. 3, as previously stated, this appeal is on questions of law, therefore, inasmuch as this court does not have the case for trial de novo, we are bound by the findings of fact of the trial judge as shown in his written opinion where sup-

ported by credible evidence in the record. The trial judge had the opportunity of hearing the testimony of the witnesses first hand, was in a position to appraise their interest in the cause, their manner of testifying and their candor while testifying on the witness stand. The trial judge also had before him all of the documentary evidence, including the ordinances of the City of Cleveland, the Urban Renewal Plan, the Loan and Capital Grant Contract between the City of Cleveland and the United States of America, the report to Council by the Director of Urban Renewal and the ordinance approving the Erieview Project-I and General Renewal Plan, as well as other exhibits. Upon an examination of all the evidence, we cannot conclude that the findings of the trial court were contrary to the manifest weight of the evidence, and, therefore, assignment of error No. 3 is overruled.

In this context, we again point to the decision of the Supreme Court of the United States in the case of *Berman v. Parker, supra*, where, at page 33, the court stated:

> "We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. See Day-Brite Lighting Inc. v. Missouri, 342 U. S. 421, 424. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capitol should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way."

If we substitute the Council of the City of Cleveland for Congress and the Planning Commission of the City as one of its authorized agencies, and the City of Cleveland for the District of Columbia, the words of the United States Supreme Court have equal application to the facts of the instant case, bearing in mind that the taking of property in such a case is for a public use and is authorized under the provisions of the Home Rule Charter of the City of Cleveland and the Ohio Constitution.

Thus, it appears that the acquisition by the City of all the various properties and the titles thereto is only a means to an end. The objective is the elimination of blighted areas and the subsequent reconveyance of part or all of said land to the redeveloper or redevelopers with exclusive restrictions on the use of the land to prevent recurrence of blight. It is a plan national in scope. The plan is not confined to slum clearance or public housing, although these limited objectives may be part of an entire Urban Renewal program. In this and similar cases, the plaintiff is protected by being adequately compensated for her property, either through direct negotiation with the City or by the finding of a jury in the appropriation proceeding which is now pending in the Court of Common Pleas against the plaintiff's property. The plaintiff, by the action here, indicates her complete disapproval of such procedures on the ground that her individual property cannot be classified as blighted, but the trial court found that her property, although not blighted, was within a blighted area, a finding of fact which we must sustain. This presents a situation wherein the plaintiff's natural wishes to retain her property are subordinated to the good and welfare of the community as a whole. It is the inevitable result of the absolute necessity of the City, acting in good faith, to eliminate and prevent urban blight and

deterioration and to give an opportunity to the City to thrust forward with a comprehensive urban renewal plan for the benefit of the entire community.

There appearing to be no errors prejudicial to the plaintiff on the face of the record, the judgment of the Court of Common Pleas is affirmed.

Exceptions may be noted and a Journal entry drawn in accordance herewith.

KOVACHY, *P. J.*, SKEEL, *J.* concur.

APPENDIX D.

Journal Entry of the Court of Appeals of Cuyahoga County, Ohio.

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, and the original papers and pleadings from the Court of Common Pleas of Cuyahoga County, and the arguments and briefs of Counsel, and upon consideration the Court finds there is no error prejudicial to the appellant.

It is, therefore, ordered that the judgment of the Court of Common Pleas be, and the same is hereby, affirmed and that the appellees recover from the appellant all their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

Exceptions are allowed to appellant.

Dated March 12, 1962.

APPENDIX E.

Journal Entries of the Supreme Court of Ohio.

May 9, 1962:

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

It is ordered by the Court that this motion is overruled.

May 9, 1962:

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

It is further ordered that the defendants appellees recover from the plaintiff appellant their costs herein expended; that a mandate be sent to the Court of Common Pleas to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

June 13, 1962:

Upon consideration of the application for rehearing, it is ordered by the Court that rehearing is denied.

APPENDIX F.

Ordinance of the City of Cleveland Establishing Erieview Renewal Plan.

Ord. No. 2428-60.

By Mr. Latkovic (by departmental request).

An emergency ordinance approving the plan adopted by the City Planning Commission on November 25, 1960, for the General Neighborhood Renewal Plan for Erieview, Ohio R-31, and for Erieview Project I, Ohio R-36.

Whereas, pursuant to the provisions of Section 1.5104 of the Codified Ordinances of the City of Cleveland, the City Planning Commission on November 25, 1960 has adopted a plan for the renewal of the area more particularly described therein and in this ordinance, which plan is designated "Erieview General Neighborhood Renewal Plan, Ohio R-31"; and

Whereas, on the same date said Commission also adopted a plan for the renewal of Project I thereof, the area more particularly set forth and described therein and in this ordinance, which plan is designated "Erieview Project I, Ohio R-36"; and

Whereas, said plans have been submitted to this Council pursuant to Section 1.5105 of the Codified Ordinances of the City of Cleveland for approval; and

Whereas, this ordinance constitutes an emergency measure required for the immediate preservation of the public property, health and safety because of the existence of slum and blighted areas and conditions of deterioration menacing the public health and safety of the citizens of Cleveland; now, therefore,

Be it ordained by the Council of the City of Cleveland:

SECTION *1.* That the plans designated "Erieview General Neighborhood Renewal Plan, Ohio R-31," and "Erieview Project I, Ohio R-36" submitted for approval of this Council is hereby ordered received as a matter of public record and filed with the Clerk of Council for public inspection and information.

SECTION *2.* That it is hereby found and determined that the area, described in said Erieview General Neighborhood Renewal Plan as follows:

* * * * *

[Description of Property Omitted.]

and indicated on the map attached to said plan and made part thereof, in a blighted, deteriorated and deteriorating area of the City of Cleveland within the purview of Section 1.5102 of The Codified Ordinances of the City of Cleveland.

SECTION *3.* That it is hereby found and determined that said Erieview General Neighborhood Renewal Plan, Ohio R-31 and Erieview Project I, Ohio R-36 conform to the General Plan of Cleveland, as adopted in 1949, and as amended; conform to the Downtown General Plan of the City of Cleveland as amended within which the Erieview area lies, and conforms to the workable program of the City of Cleveland for the elimination and prevention of slums and blight.

SECTION *4.* That it is hereby found and determined that said Erieview General Neighborhood Renewal Plan, Ohio R-31 and Erieview Project I, Ohio R-36, will afford the maximum opportunity consistent with the sound needs of the City of Cleveland for the rehabilitation, conservation or development of the Erieview Urban Renewal area

SECTION 5. That it is hereby found and determined that the redevelopment of the Erieview Project I, Ohio R-36 for predominantly nonresidential reuse is necessary for the proper development of the community.

SECTION 6. That it is hereby found and determined as the result of a competent independent analysis of the local supply of transient housing, that there exists in the Erieview Urban Renewal area and the City of Cleveland a need for additional units of such housing.

SECTION 7. That it is hereby found and determined that it is necessary to provide, in the urban renewal plan, for lands to be made available to institutions of higher learning to be used by such educational institutions for redevelopment in accordance with the use or uses specified in the urban renewal plan and the redevelopment of such area in accordance with said urban renewal plans, as provided by Section 112 of the Housing Act of 1949, as amended.

SECTION 8. That it is hereby found and determined that the Erieview General Neighborhood Renewal Plan, Ohio R-31 and Erieview Project I, Ohio R-36, have been adopted in compliance with the provisions of Section 1.5104 of the Codified Ordinances of the City of Cleveland and that said plans are in full conformity with the requirements of Section 1.5103 of the Codified Ordinances of the City of Cleveland.

SECTION 9. That the Erieview General Neighborhood Renewal Plan, Ohio R-31 and Erieview Project I, Ohio R-36, adopted by the City Planning Commission of the City of Cleveland on the 24th day of November, 1960, and submitted to this Council as File No. 2393-60 on the 28th day of November, 1960, be and the same are hereby approved.

SECTION *10*. That the Erieview General Neighborhood Renewal Plan, Ohio R-31, be and is hereby approved in all respects; that it is determined to be adequate as an outline of the urban renewal activities proposed for the area involved, as a framework for the preparation of urban renewal plans, and to indicate generally to the extent feasible in preliminary planning, the land use, population density, building conversion, prospective requirements for rehabilitation and improvement of property, and any portions of the area contemplated for clearance and redevelopment.

SECTION *11*. That it is hereby found and determined that the standards established and the controls set forth in said Erieview Project I, Ohio R-36, are necessary to be maintained and enforced in the public interest, and the same are hereby adopted as fully and completely as if herein set forth as and with the effect of the ordinances of the City of Cleveland.

SECTION *12*. That it is hereby found and determined that the statement of the methods for the temporary relocation of families displaced from Erieview Project I, Ohio R-36, area submitted with the Urban Renewal Plan for said area, presents a feasible plan for such family relocation within the requirements of Section 1.5102 of the Codified Ordinances of the City of Cleveland.

SECTION *13*. That it is hereby found and determined that in order to enable the City of Cleveland to undertake Erieview Project I, Ohio R-36, in accordance with the Urban Renewal Plan for said project area, the City will be required to avail itself of the financial assistance provided by Title I of the Housing Act of 1949, as amended, said Title I imposing certain obligations and responsibilities, and requiring among other things:

(1) The provision of local grants-in-aid;

(2) A feasible method for the relocation of families displaced from the project area;

(3) Other local obligations and responsibilities in connection with the undertaking and carrying out of urban renewal projects;

and that the City of Cleveland is required to make application for a loan under Section 102(a) of said Title I in the amount of $34,657,000 and for a Project Capital Grant to the full amount avilable for the undertaking and financing of the Project, presently estimated at $805,000, which amounts shall be subject to increase or decrease from time to time, depending upon the final costs as determined upon the completion of said project.

The Commissioner of Slum Clearance and Blight Control is hereby authorized and directed to execute and file such application with the Housing and Home Finance Agency and to provide such additional information and to furnish such documents as may be required in behalf of said Agency, and to act as the authorized correspondent of the City of Cleveland.

SECTION *14*. That in the event that a contract with the Federal Government is authorized by Ordinance of Council based upon the application authorized in Section 13 hereof, or supplemental or amendatory applications under said authority of Council of the City of Cleveland, for and on behalf of the City of Cleveland, pledges the cooperation of the City in helping to carry out the Urban Renewal Plan for the Erieview Project I, Ohio R-36 area and to provide the necessary local grants-in-aid required pursuant to said plan.

SECTION *15*. That this ordinance is hereby declared to be an emergency measure and, provided it receives the

affirmative vote of two-thirds of all members elected to Council, it shall take effect and be in force immediately upon its passage and approval by the Mayor; otherwise it shall take effect and be in force from and after the earliest period allowed by law.

Passed December 12, 1960.

Effective December 12, 1960.

APPENDIX G.

"Ordinance of 1787."

Adopted by Congress July 13, 1787 and providing for the government of the territory of the United States northwest of the River Ohio.

"Section 14:

It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable unless by common consent, to-wit:

ARTICLE II.

The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law

of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide and without fraud previously formed."

APPENDIX H.

42 U. S. C. § 1460(c) Public Law 86-372, Title IV, § 413, 73 Stat. 675, 677, as Amended Sept. 23, 1959.

Financial assistance shall not be extended under this subchapter with respect to any urban renewal area which is not predominantly residential in character and which, under the urban renewal plan therefor, is not to be redeveloped for predominantly residential uses; Provided, That, if the governing body of the local public agency determines that the redevelopment of such an area for predominantly non-residential uses is necessary for the proper development of the community, the Administrator may extend financial assistance under this subchapter for such a project; Provided further, That the aggregate amount of capital grants contracted to be made pursuant to this subchapter with respect to such projects after September 23, 1959, shall not exceed 20 per centum of the aggregate amount of grants authorized by this subchapter to be contracted for after such date.